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19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA

21 COVAD COMMUNICATIONS
22 COMPANY,

23 Plaintiff,

24 v.

25 PACIFIC BELL, *et al.*,

26 Defendants.

No. C 98-1887 SI

SBC COMMUNICATIONS INC.'S
AND SOUTHWESTERN BELL
TELEPHONE COMPANY'S
MEMORANDUM IN SUPPORT
OF THEIR MOTION TO DISMISS
COVAD COMMUNICATIONS
COMPANY'S SECOND
AMENDED COMPLAINT

Date: December 10, 1999

Time: 9:00 a.m.

Place: Courtroom 4

Before: The Honorable Susan Illston

1 In addition, even assuming the existence of personal jurisdiction over SWBT in
2 this Court, there is no reason for this Court to retain jurisdiction over Covad's claims
3 against SWBT, while the Section 252 process is ongoing because most of Covad's
4 allegations will be addressed in the context of that process and then will be subject to
5 review by a federal district court in Texas. While that process is ongoing, Covad has an
6 interim interconnection agreement with SWBT and, based on that agreement, is
7 offering service in Texas. Thus, on the basis of the doctrine of primary jurisdiction, the
8 Court should dismiss, without prejudice, Covad's claims against SWBT; alternatively,
9 the Court should transfer those claims to a federal district court in Texas.

10 Apart from the jurisdictional obstacles presented by Covad's claims against
11 SWBT, these claims have other obstacles as well. Most fundamentally, Covad's claims
12 depend on meritless theories of competitive injury, some of which were explicitly
13 rejected by the Federal Communications Commission ("FCC") in its recent decision
14 approving the SBC-Ameritech merger. For example, Covad alleges that "[t]he SBC
15 entities . . . have attempted . . . to create an anticompetitive price squeeze" (Compl.
16 ¶ 59); however, the FCC, in the context of incumbent local exchange carriers giving
17 competitive local exchange carriers access to their networks, concluded that "adequate
18 safeguards are in place to prevent price squeezes."¹ Similarly, Covad alleges that
19 "SWBT . . . refuse[s] to permit the purchase of the digital capabilities of local loops
20 except on condition that customers . . . also purchase from them the loops' analog voice
21 capabilities." (Compl. ¶ 108.) The FCC rejected the request that line sharing be made
22 "available immediately to competitors," noting that it has "sought comment on
23 operational, pricing and other practical issues associated with line sharing."² The FCC
24 further stated that "[t]he incumbent may engage in line sharing with its affiliate on an
25 exclusive, interim basis as long as it provides unaffiliated entities with the 'surrogate

26
27 ¹ *In re Applications of Ameritech Corp. and SBC Communications Inc.*, CC Docket No. 98-
141, ¶¶ 232-33 (FCC Oct. 6, 1999).

28 ² *Id.* ¶ 477.

1 line-sharing' discount described for the use of a second loop to provide advances
2 services.”³ Under these circumstances, the FCC concluded that an incumbent cannot
3 “unfairly advantage [its] affiliate vis-a-vis competitors.”⁴

4 For these reasons, and as more fully explained below, the Court should dismiss
5 Covad’s claims against SBC and SWBT.

6 **I. The Court Should Dismiss Covad’s Claims Against SBC**⁵

7 **A. The Court Lacks Personal Jurisdiction Over SBC**

8 SBC is a non-resident defendant; it is “a Delaware corporation with its principal
9 place of business in San Antonio.” (Compl. ¶ 8). “Personal jurisdiction over a
10 nonresident defendant requires two things. First, the defendant must be amenable to
11 service of process under the applicable state long arm statute, and second, the exercise
12 of jurisdiction must satisfy the due process clause.” *Calvert v. Huckins*, 875 F. Supp.
13 674, 676 (E.D. Cal. 1995) (citing *Pacific Atlantic Trading Co. v. M/V Main Express*, 758
14 F.2d 1325, 1327 (9th Cir. 1985)). Covad bears the burden on both these issues (*Doe v.*
15 *Unocal Corp.*, 27 F. Supp.2d 1174, 1181 (C.D. Cal. 1998) (citing *Cabbage v. Merchant*,
16 774 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985)) – a burden that
17 Covad cannot meet.

18 California’s long-arm statute provides that jurisdiction may be exercised over
19 nonresident defendants “on any basis not inconsistent with the Constitution of this
20 State or the United States.” Cal. Civ. Proc. Code § 410.10. Thus, the requirements
21 under the California long-arm statute are co-extensive with constitutional due process
22 requirements. In order for the exercise of jurisdiction over a nonresident defendant to
23 comport with due process, the defendant must have certain minimum “contacts with
24

25 ³ *Id.* ¶ 365.

26 ⁴ *Id.* ¶ 478.

27 ⁵ Covad’s claims against SBC are for Telecommunications Act violations (Count 6);
28 intentional misrepresentation (Count 8); negligent misrepresentation (Count 9); unfair
competition (Counts 10 and 12); interference with contractual relations (Count 11); and
interference with prospective economic advantage (Count 13).

Because Covad has not alleged anything more than transitory or temporary exclusion from the Texas market, it cannot establish SWBT's power to exclude competition. Covad's antitrust claims against SWBT fail, as a matter of law, for this reason as well.

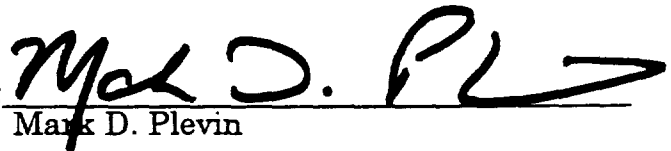
CONCLUSION

For the foregoing reasons, the claims against SBC and SWBT in Covad's Second Amended Complaint should be dismissed.

Dated: October 20, 1999

CROWELL & MORING LLP

By:


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COMPANY

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(...continued)

temporary harmful effects on competition (and not merely upon a competitor or customer)' [is required] before these practices can rise to the level of exclusionary conduct"; *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) ("The power to eliminate competition must not be momentary, but must be at least relatively permanent"); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 696 n.22 (10th Cir. 1989) ("Market power must be persistent to make a firm a monopolist for purposes of the antitrust laws. . . . The triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory effect").

COVAD BACKGROUND

- Largest DSL Provider in NY
- First to Market in NY: 10/98 (compared with BA DSL launch in 5/99)
- First to offer residential DSL service
- Loops:
 - 2,704 provisioned (thru 8/99) (of BA's 3,520 total of DSL and premium loops)
 - 4,775 ordered (thru 8/99).
- Collocations: over 100 across NY (NYC metro, Albany, Buffalo, Rochester, Syracuse)

SUMMARY

- History of Denial, Delay, and Degrade
- Poor Loop Provisioning:
 - 29% on time performance (June through August, 1999)
 - 13% on time performance (August, 1999)
- Inadequate OSS:
 - Discriminatory Access
 - No KPMG test of DSL
- Discriminatory Pricing:
 - No Long Loop Service
- Other Unresolved Issues: No Performance Standards or Remedies to Prevent Backsliding

MANAGING THE PROBLEM

- Moved Service Delivery from California to Boston and New York
- Added Numerous Employees to “Chase” Loop Orders from Order Placement through Provisioning
- Stopped Ordering Long Loops (>18 kft)
- Multiple Performance Reports (Due Date-2, FOC, DD+1,)
- Created ILEC Relations to Escalate Problems
- Loop Acceptance Testing (since 9/15/99)

LOOP PROVISIONING

- Failures that Affect Voice OR Data Services
- Three Points of Delay:
 - Late Due Dates (FOCs): on average 5 business days (BA commits to 72 hrs)
 - Failure to Complete Cross Connect in Central Office
 - Failure to Complete Installation at Customer Premises
- 46 Day Average Interval

LATE DUE DATES

- BA promised interval: 72 hours
- Average interval: 5 business days
- Late Due Dates:
 - Only 50% of Covad's loops receive due dates within 72 hours (6/99-8/99)
 - Only 23% for 8/99

FAILURE TO COMPLETE CENTRAL OFFICE WIRING

- Failed Harris Test:
 - 26% failure for 6/99-8/99
 - Trend worsening:
 - 29% for 8/99
 - 37% for 9/99
- Primary Cause: Failure to Complete Simple Cross Connect in the CO
 - No voice or data can be provided over a loop that is not connected at the CO

FAILURE COMPLETE LOOP INSTALLATION

- Covad does not roll a truck until 7 to 10 days *after* due date due to chronic delays by BA
- Causes of Failed Installations:
 - Loop not delivered
 - Loop not identified (tagged)
 - Loop delivered to wrong location
 - All failures would affect *voice or data*
- 23% Failed Installations for 6/99-8/99

END RESULT OF POOR PROVISIONING

- 100 Orders (stats from 6/99-8/99 performance):
 - 50% receive due date within 72 business hours (50 orders proceed to install)
 - 74% (37 orders) are wired in the CO on the due date
 - 78% (29 orders) are installed at customer's premises
- 29% of original 100 orders are provisioned on time

ACCEPTANCE TESTING

- Covad attempted to get acceptance testing since 3/99
- BA initiated acceptance testing due to 271 case: officially began 9/15
- As of 9/29, no improvement in provisioning:
 - 39% of Covad loops fail Harris Test (9/15-9/29) primarily due to no cross connect in the CO
- BA not testing 100% loops that are due each day
- Average hold times: 2 minutes (required 5 minutes)

OSS: Preorder

- Preorder:
 - Address Verification Is Cumbersome and Time-Consuming:
 - Exact duplication of address is required
 - TISOC frequently queries back to Covad to correct
 - Loop Information Is Not Readily Available, Incomplete, and Suspect

OSS - Ordering

- Order:
 - SBNs: Delayed, Inaccurate, Incomplete
 - TISOC Inadequately Staffed and Trained:
 - Ignorant on DSL Loop Ordering: BA has made loop ordering inordinately complicated (numerous loop products created)
 - TISOC Inconsistent on Error Identification

Ordering - Cont'd

- Order, Cont.:
 - Receipt of Due Dates:
 - BA is chronically late with due dates
 - Continual backlog of orders with no due dates
 - Five business days on average
 - Due dates frequently change without notice to Covad
 - Covad sends BA FOC/Due Date Report Two Times a Week

Ordering - Cont'd

- Order - Cont'd:
 - No Facilities:
 - Increased frequency since ordering DSL loops (BA guaranteed copper facilities)
 - Could mean (1) no copper; (2) no facilities at all; (3) defective loop; (4) long loop
 - Can't get clarification on type of facilities problem: 5 days+ to get response in some instances
 - Receipt of invalid FOCs: BA gives due date before checking availability of facilities then cancels due date and issues new due date

Ordering - Cont'd

- No Facilities - Cont'd:
 - No means to verify no facilities
 - No defined process to deal with no facilities
- Impact of No Facilities:
 - Contact customer and ascertain whether downgrade is acceptable
 - Cancel existing loop order (DSL loop)
 - Submit new order for another type of loop (premium loop)

Maintenance and Repair

- Ping Ponging between RCCC, RCMC and TISOC:
 - RCMC (Maintenance Center) won't dispatch because loop not provisioned
 - RCCC won't allow trouble ticket to be opened for loop that is not accepted
 - Covad accepts loop that hasn't been provisioned in order to open a trouble ticket

M&R - Cont'd

- Multiple trouble tickets needed to clear loop provisioning problems: No Trouble Found
- Vendor Meets after Two Trouble Tickets Opened:
 - BA chronic no-show

EVIDENCE OF DISCRIMINATION

- BA Retail Performance (Crocker Letter):
 - Usual time to install: 7 - 10 days
 - Information Needed to Check Availability:
Phone Number
 - Confirmation that Order Accepted:
Immediate
 - Scheduling of Install Date: Immediate
 - Resolution of Install Problems: High
Priority and Quick Resolution

EVIDENCE OF DISCRIMINATION - CONT'D

- BA Wholesale Performance (Covad):
 - Usual time to install: 30-45 days
 - Info Needed to Check Availability: Phone Number and Exact Street Address
 - Confirmation that Order Accepted: 2 - 6 days
 - Scheduling of Install Date: 14 - 21 days after order placed
 - Resolution of Install Problems: BA cancels order and forces Covad to submit another order

DISCRIMINATORY PRICING

- BA does not charge extra to retail ISDN customers served by long loops
 - Actual evidence provided in Markley Declaration
- BA's Excessive Non-Recurring Charges: Effective Denial of Access to Long Loops

OTHER DISCRIMINATION

- No Facilities: No Copper Available
- Loop Length Discrepancy